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ALEXANDER L. STEVAS

No. 83-1129

In the Supreme Court of the United States

OCTOBER TERM, 1983

ANTONIO CIAMMITTI AND SABATINO CIAMMITTI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that evidence should have been suppressed because government agents violated 18 U.S.C. 3109 in executing a search warrant; that the warrant authorizing the search was tainted by false information; and that the indictment should have been dismissed because of pre-indictment delay.

1. Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Michigan, petitioners were convicted of conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. 846. Petitioner Antonio Ciammitti was sentenced to two years' imprisonment. Petitioner Sabatino Ciammitti was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1a-17a; 720 F.2d 927).

Prior to trial, petitioners moved to suppress evidence seized during a warrant-authorized search at the home of petitioner Antonio Ciammitti in Riverview, Michigan. In an affidavit supporting the issuance of the warrant, Drug Enforcement Administration Agent Thomas Powell alleged that, on several dates in December 1979, he observed petitioner Antonio Ciammitti obtain from a Columbus, Ohio establishment chemicals and laboratory equipment that could be used to manufacture methamphetamine. The affidavit further alleged that on January 14, 1980, the agent observed both petitioners load chemicals into an automobile and transport those chemicals to Antonio Ciammitti's residence. On the basis of this and other information, a magistrate issued a search warrant for that residence. Pet. App. 6a-7a.

The agents arrived at the residence to execute the warrant at 12:15 a.m. on January 18, 1980. As the agents approached the house, they observed light coming from a basement window. The agents knew that odors associated with the manufacture of methamphetamine had been detected coming from the basement on previous nights when the lights were on. Several agents stationed themselves outside the basement window, while other agents, led by Agent Powell, approached the front door, knocked loudly, and announced their presence and purpose. About 15 to 30 seconds later the first group of agents broke the basement window and pulled their guns on petitioner Sabatino Ciammitti, whom they saw through the window. At the same time, the agents under Agent Powell's supervision began to break down the front door with a battering ram. Once the agents with the battering ram made a hole in the front door, they saw Antonio Ciammitti's wife standing inside the house. After the agents again identified themselves and demanded entry, Mrs. Ciammitti opened the door. The search of the basement uncovered a complete laboratory capable of producing methamphetamine.

2. Petitioners contend (Pet. 6-12) that when the agents attempted to break down the door they were not justified in believing that they had been refused entry, and that their conduct therefore violated 18 U.S.C. 3109. The court of appeals correctly rejected this fact-bound contention.

In concluding that the agents "acted reasonably in assuming they had been refused admittance" (Pet. App. 12a), the court of appeals considered "all the circumstances," including the following: (1) the agents knew that chemicals and equipment used to manufacture illegal drugs had been taken into the house by two men; (2) odors associated with the manufacture of illegal drugs had emanated from the basement on previous nights when the basements lights were on; (3) the basement lights were on when the agents approached the house; and (4) while demanding entry at the front door Agent Powell heard the other group of agents break the basement window and yell, "Freeze." These facts support the court of appeals' conclusion that the agents' actions were in compliance with Section 3109.[1] The question whether, in the particular circumstances of this case, the agents waited a proper length of time before attempting a forcible entry is not of sufficient general importance to warrant this Court's review.[2]

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[1]Petitioners' reliance on *Miller* v. *United States*, 357 U.S. 301 (1958), is misplaced. As the court below pointed out (Pet. App. 10a-11a), *Miller* involved starkly different facts—in that case the officers did not have a warrant and never expressly demanded admission or stated their purpose.

[2]In any event, as the district court held in denying petitioners' suppression motion (Pet. App. 12b), the evidence seized inside the house pursuant to the search warrant was not the fruit of any arguable violation of Section 3109's standards. At most, the agents' actions resulted in unnecessary property damage; their actions did not invade any legitimate privacy interest that the occupants of the house might have enjoyed. This "fruits" argument is similar to one we have made in our petition for a writ of certiorari in *United States* v. *Moreno*,

3. Petitioners contend (Pet. 13-17) that the evidence seized in the search of the house should be suppressed because of allegedly deliberate factual misrepresentations in the search warrant affidavit. This contention is insubstantial and was correctly rejected by both courts below (Pet. App. 6a-8a, 7b-8b).

Petitioners claim that Agent Powell's allegations that he "observed" petitioners receiving certain chemicals was a deliberate misrepresentation because the agent saw only that petitioners received cartons from the chemical company. As the court of appeals pointed out (Pet. App. 7a), however, Agent Powell testified at the suppression hearing

> that he personally observed the chemicals immediately prior to each delivery and he knew from conversations with the head of the chemical supply firm and from examining invoices that these chemicals were to be delivered to the [petitioners]. He saw some of the chemicals being placed in cartons which resembled those later loaded into the [petitioners'] vehicles. The chemicals were in original packages which bore identifying labels.

Petitioners' challenge to the agent's use of the word "observed" in these circumstances is preciseley the kind of hypertechnical reading of search warrant affidavits that this Court has consistently rejected. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20; *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965). Certainly, there is no basis for concluding that the agent's failure to explain in the affidavit the underlying basis for his knowledge that the

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No. 83-396 (filed Sept. 8, 1983). Because the court of appeals in this case correctly concluded that the agents complied with Section 3109, there is no need for this Court to hold this case pending the disposition of *Moreno*.

cartons contained particular chemicals constituted a deliberate falsehood such as that contemplated in *Franks* v. *Delaware*, 438 U.S. 154 (1978).

4. Petitioners contend (Pet. 18-23) that a two-year delay between the date the initial complaint against them was dismissed and the date of their indictment warrants dismissal of the indictment pursuant to Fed. R. Crim. P. 48(b). Petitioners do not assert any due process claim, nor could they, since they have never contended that the delay adversely affected their ability to defend themselves. See *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977). Similarly, because no charges were pending against petitioners during the two-year period in question, they are not entitled to dismissal of the indictment on speedy trial grounds. See *United States* v. *MacDonald*, 456 U.S. 1 (1982).

Petitioners nevertheless argue that the district court should have heard evidence regarding the personal hardships that they experienced as a result of the delay and should have dismissed the indictment on that basis pursuant to Rule 48(b), which petitioners assert is broader in scope than the constitutional due process and speedy trial guarantees. Petitioners' argument is entirely without merit. We note that, other than alleging personal hardship, petitioners are unable to point to any aggravating circumstance, such as incarceration, loss of a witness, or government misconduct, that would warrant dismissal on account of the delay. Furthermore, assuming the district court would have power under Rule 48(b) to dismiss an indictment with prejudice in extraordinary circumstances, the Rule surely provides broad discretion for the district court in deciding not to order dismissal. In the absence of any aggravating circumstance calling the basic fairness of the revived charge into question, there is simply no basis for finding that the district court abused its discretion in denying petitioners' motion to dismiss.

It is therefore respectfully submitted that the petiton for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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